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Second report on the protection of persons in the event of disasters

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I. Introduction*

1. The present report on the protection of persons in the event of disasters is preceded by a preliminary report on the same topic,[1] submitted by the Special Rapporteur at the sixtieth session of the International Law Commission in May 2008, following the Commission's decision at its fifty-ninth session in 2007,[2] to include the topic in its current programme of work.

2. The preliminary report dealt in a general way with the scope of the topic, in order to properly circumscribe it.[3] To that effect, it presented a broad outline of the most relevant legal questions involved, clustering the discussion around three axes: *ratione materiae* (including the concept and classification of disasters[4] and the concept of protection of persons[5]), *ratione personae*[6] and *ratione temporis*.[7] Of special interest was the possibility of a rights-based approach to the topic, which the Special Rapporteur examined without prejudice to the outcome of further debates.[8] Applicable sources of law for international disaster protection and assistance were also assessed,[9] and some preliminary ideas regarding the appropriate final form of the work were presented.[10]

3. The preliminary report was considered by the Commission at its 2978th to 2982nd meetings, in July 2008.[11] Discussion among members of the Commission focused on the advantages and challenges featured by a rights-based approach to the topic.[12] The appropriate limits of its scope were also thoroughly discussed in reference to the three mentioned axes,[13] as was the right to humanitarian assistance as an important element to be considered in subsequent stages of the debates.[14]

4. The Commission gave attention to the notion of "responsibility to protect", whose relevance for the present topic remained unclear for some members, particularly in the context of disasters.[15] Sources relevant to the consideration of the topic were finally examined, highlighting the importance for the Commission's work of not duplicating prior work on the topic done elsewhere,[16] for example, the

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[1] A/CN.4/598.

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

[3] A/CN.4/598, para. 9.

[4] Ibid., paras. 44-49.

[5] Ibid., paras. 50-55.

[6] Ibid., para. 56.

[7] Ibid., paras. 57 and 58.

[8] Ibid., paras. 12, 26 and 51.

[9] Ibid., paras. 21-42.

[10] Ibid., paras. 59 and 60.

[11] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 216.

[12] Ibid., paras. 227-229.

[13] Ibid., paras. 230-240.

[14] Ibid., paras. 241-246.

[15] Ibid., paras. 247-250, esp. 248.

[16] Ibid., paras. 251-256.

Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the International Federation of Red Cross and Red Crescent Societies (IFRC) at its 30th Conference in 2007.[17]

5. In October and November 2008, at the sixty-third session of the General Assembly, the Sixth Committee further considered the preliminary report and the debate held thereon in the Commission. In connection with the discussion of chapter IX of the Commission's report on the work of its sixtieth session (A/63/10), more than 20 States and IFRC presented their views on the issues put forward by the Special Rapporteur's report. All delegations shared the view of the Special Rapporteur on the importance and timeliness of the general undertaking, and all agreed on the topic's particular complexities, which warrant special care in its treatment by the Commission. A provisional understanding was reached regarding the final outcome of the work: while some States favoured non-binding guidelines,[18] there was no objection to the suggestion that work should proceed in the form of draft articles, whose ultimate binding force could be decided at a later stage.

6. A similar understanding emerged with regard to some limitations of the scope *ratione materiae*. The exclusion of armed conflict from the subject matter to be studied was supported by all delegations that referred to the issue.[19] Likewise, to draw a strict line between man-made and natural disasters seemed unnecessary to various delegations, particularly if both causes would produce similar effects.[20] Nonetheless, some of those delegations proposed that, as a question of methodology, work could start by considering natural disasters and then move on to other types of disaster.[21]

7. Limitations on the scope *ratione temporis* were also discussed in the Sixth Committee. In various interventions,[22] the idea was put forward of limiting, in principle, the Commission's work to two phases of a disaster situation: the disaster proper (response) and post-disaster (early recovery), without prejudice as to the further consideration of issues of preparedness at the pre-disaster phase in the future.

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[17] Available at www.ifrc.org/what/disasters/idrl/advocacy/guidelines.asp.

[18] For example, Germany (A/C.6/63/SR.22, para. 60), India (A/C.6/63/SR.23, para. 21) and the United Kingdom (A/C.6/63/SR.23, para. 64).

[19] For example, Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 54), India (A/C.6/63/SR.23, para. 19), Japan (A/C.6/63/SR.23, para. 41), Republic of Korea (A/C.6/63/SR.23, para. 24), Poland (A/C.6/63/SR.24, para. 55), Spain (A/C.6/63/SR.23, para. 37) and the United Kingdom (A/C.6/63/SR.23, para. 63).

[20] For example, Austria (A/C.6/63/SR.23, para. 7), Chile (A/C.6/63/SR.22, para. 14), Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 54), France (A/C.6/63/SR.24, para. 81), Germany (A/C.6/63/SR.22, para. 60), Greece (A/C.6/63/SR.24, para. 6), Republic of Korea (A/C.6/63/SR.23, para. 24) and the United Kingdom (A/C.6/63/SR.23, para. 63). See also Argentina (A/C.6/63/SR.24, para. 64) (drawing a sharp line between natural and man-made disasters would be difficult).

[21] For example, Japan (A/C.6/63/SR.23, para. 41), Republic of Korea (A/C.6/63/SR.23, para. 24), Mexico (A/C.6/63/SR.23, para. 61), Portugal (A/C.6/63/SR.25, para. 6) and Spain (A/C.6/63/SR.23, para. 37).

[22] For example, Austria (A/C.6/63/SR.23, para. 9), France (A/C.6/63/SR.24, para. 80), Republic of Korea (A/C.6/63/SR.23, para. 24) and New Zealand (A/C.6/63/SR.24, para. 11).

8. Finally, a rights-based approach to the topic was supported by various delegations,[23] while some expressed doubts as to whether such was the correct path to be followed in this case.[24] Similarly, while the relevance of a "responsibility to protect" still remained unclear for several delegations,[25] some delegations considered that the Commission should not find itself prevented from considering that notion, should the logic of its undertaking propel it in that direction.[26]

9. In the report on the work of its sixtieth session, the Commission indicated that it would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome in particular information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters.[27] Replies to the Commission's concern were given orally by El Salvador in its statement in the Sixth Committee[28] and in writing by Mexico on 5 November 2008 and Germany on 26 February 2009. The written replies have been circulated as internal documents of the Commission.

10. Also at its sixtieth session, the Commission decided to pose a question to the United Nations system, in the following terms:

> How has the United Nations system institutionalized roles and responsibilities, at global and country levels, with regard to assistance to affected populations and States in the event of disasters — in the disaster response phase but also in pre- and post-disaster phases — and how does it relate in each of those phases with actors such as States, other intergovernmental organizations, the Red Cross movement, non-governmental organizations, specialized national response teams, national disaster management authorities and other relevant actors?[29]

The Commission likewise decided to seek information from IFRC on the basis of a similar inquiry adjusted as appropriate.[30]

11. By letters dated 6 November 2008 the Secretary of the Commission transmitted the question to the two addressees. Replies were received on 10 March 2009 from IFRC and on 17 April from the Office for the Coordination of Humanitarian Affairs of the Secretariat. These replies have been circulated as internal documents of the Commission.

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[23] For example, Chile (A/C.6/63/SR.22, para. 16), Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 53), France (A/C.6/63/SR.24, para. 81), Poland (A/C.6/63/SR.24, para. 55), Portugal (A/C.6/63/SR.25, para. 6), Spain (A/C.6/63/SR.23, para. 37) and Thailand (A/C.6/63/SR.23, para. 90). See also Austria (A/C.6/63/SR.23, para. 10) (elements of human rights law will have a bearing on the topic).

[24] For example, China (A/C.6/63/SR.23, para. 29), New Zealand (A/C.6/63/SR.24, para. 11) and the Netherlands (A/C.6/63/SR.22, para. 62).

[25] For example, China (A/C.6/63/SR.23, para. 31), India (A/C.6/63/SR.23, para. 20) and Japan (A/C.6/63/SR.23, para. 42).

[26] For example, Finland (on behalf of the Nordic States) (A/C.6/63/SR.22, para. 55), Poland (A/C.6/63/SR.24, para. 53) and Portugal (A/C.6/63/SR.25, para. 6).

[27] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 31.

[28] A/C.6/63/SR.23, paras. 56 and 57.

[29] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 32.

[30] Ibid., para. 33.

12. During the sixtieth session of the Commission and afterwards, the Special Rapporteur continued his contacts with representatives of interested governmental and non-governmental organizations. He met in July of 2008 with Sálvano Briceño, Director of the Inter-Agency Secretariat of the International Strategy for Disaster Reduction (ISDR). He also held a separate meeting with the Office for the Coordination of Humanitarian Affairs, chaired by Dusan Zupka (Emergency Preparedness Section) and attended by 14 officials of the Office; a meeting with IFRC chaired by Ibrahim Osman, Deputy Secretary-General, and attended by six Federation officials; and a meeting with the Protection Cluster Working Group chaired by Walter Kälin, Representative of the Secretary-General on human rights of internally displaced persons and attended by four other members of the Working Group, mainly officials from the Office of the United Nations High Commissioner for Refugees (UNHCR).

13. For the benefit of the Special Rapporteur, a round-table meeting on the topic was convened in Geneva in December 2008, presided over by the Representative of the Secretary-General on human rights of internally displaced persons and attended by 14 officials from his office, the Office of the High Commissioner for Human Rights, IFRC, the Office for the Coordination of Humanitarian Affairs, UNHCR, the United Nations Children's Fund and members of the Protection Cluster Working Group.

Recent developments

14. In the period following the end of the Commission's sixtieth session, a number of documents have been issued that are of relevance to the consideration of the present topic. They include:

(a) The report of the independent expert on human rights and international solidarity submitted to the Human Rights Council by the High Commissioner for Human Rights;[31]

(b) The *Manual on International Law and Standards Applicable in Natural Disaster Situations* prepared and published by the International Development Law Organization. As explained in the foreword, the Manual provides a comprehensive analysis of the international legal standards pertaining to five key aspects of disaster response: human rights, the rights of vulnerable groups, the rights of children, land and property management and anti-corruption/funds management;

(c) The report of the Secretary-General on implementing the responsibility to protect.[32] Referring to paragraphs 138 and 139 of the 2005 World Summit Outcome,[33] the report explains in paragraph 10 (b) that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".

[31] A/HRC/9/10.

[32] A/63/677.

[33] General Assembly resolution 60/1 of 16 September 2005.

II. Defining the scope of the topic

15. The valuable guidance of the Commission and the Sixth Committee allows the Special Rapporteur to advance with the definition of the topic's scope. Once again, to facilitate the discussion, three aspects of scope are treated below: *ratione materiae*, *ratione personae* and *ratione temporis*.

A. *Ratione materiae*

1. Rights and needs in the protection of persons in the event of disasters

16. An important aspect of the preliminary report and the debate that ensued was the scope to be given to the protection of persons in the present undertaking, specifically in relation to the "rights-based" approach to the topic. "Rights-based" approaches emerged during the late 1980s as a conceptual change from previous paradigms of development studies.[34] The shift of language implied that development policy could and should be seen as a matter of rights, thus orienting the established regulatory and judicial machinery of human rights towards the achievement of development goals. As a result, rights standards would become crucial criteria to assess development agendas and, perhaps more importantly, rights-based reasoning would become an important part of the conceptual framework for understanding development policy.[35]

17. Rights-based approaches have, since then, expanded as a methodology for understanding the most varied aspects of development. More than a normative statement with claims of exclusivity, the approach is a useful departing position that carries the all-important baggage of rights-based language, and needs to be complemented by other views of relevance to the specific subject matter to be understood. IFRC has suggested that a rights-based approach to the topic may be complemented by considering the relevance of needs in the protection of persons in the event of disasters.[36] The Special Rapporteur believes that such an exercise can be usefully undertaken in this context. There is no stark opposition between needs and a rights-based approach to the protection of persons in the event of disasters. On the contrary, a reasonable, holistic approach to the topic seems to require that both rights and needs enter the equation, complementing each other when appropriate.

18. One further rationale to be considered when defining the scope of the topic is risk. Risk management is a crucial consideration that informs all aspects of disaster policy,[37] and it is possible to understand it in reference to two different moments of the disastrous event: first, risk as a fundamental element of disaster prevention and, second, risk as a variable in the protection of persons at the disaster proper and post-disaster phases. ISDR in Geneva is currently working for increased awareness of the importance of disaster reduction as an integral component of sustainable development.[38] In order to avoid unnecessary duplication of efforts, it seems

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[34] Debates in development studies led in 1986 to the first formal evidence of a paradigm shift, with the adoption of the Declaration on the Right to Development (General Assembly resolution 41/128, annex).

[35] See P. Uvin, *Human Rights and Development* (Kumarian Press, 2004), p. 165.

[36] A/C.6/63/SR.22, para. 68.

[37] See: ISDR, "*Living with risk: a global review of disaster reduction initiatives*", 2004.

[38] See www.unisdr.org.

reasonable to the Special Rapporteur that the Commission should at the present stage follow the efforts of ISDR on disaster prevention, leaving a risk-informed paradigm for later debates on disaster preparedeness.

2. The dual nature of the protection of persons in the event of disasters

19. In his preliminary report, the Special Rapporteur concluded, inter alia, that "[w]ork on the topic can be undertaken with a rights-based approach that will inform the operational mechanisms of protection" (A/CN.4/598, para. 62). In this connection, the Special Rapporteur notes that the kind of international regulation that would constitute a significant contribution to the subject matter can be usefully understood in reference to two different axes: the rights and obligations of States in relation to one another; and the rights and obligations of States in relation to persons in need of protection.

20. The notion that these two axes are intimately linked to, yet conceptually distinct from, one another is not new in international law. A case in point is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, whereby the Contracting Parties undertake obligations to one another, yet whose ultimate beneficiaries are human beings. In giving its advisory opinion on *reservations to the Convention*, the International Court of Justice identified with clarity the premise that informs the Special Rapporteur's approach, by holding:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[39]

21. This premise has also informed further interpretation of the Genocide Convention. Under article 1, the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. While both the perpetrators and victims of the crime are likely to be individuals, they are not direct subjects of the Convention. And yet, it seems hard to understand the legal regime established by the Convention if individuals are not included in the reasoning. An expression of this tension appeared in the Bosnia and Herzegovina *v.* Serbia and Montenegro judgment of 26 February 2007,[40] where the Respondent argued that the condition sine qua non for establishing State responsibility for the crime of genocide is the prior establishment, according to the rules of criminal law, of the individual responsibility

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[39] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951*, p. 15, at p. 23.

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.

of a perpetrator engaging the State's responsibility. The Court, mindful of the distinction between the two axes presented here, held:

> The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed
>
> [...]
>
> Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.[41]

22. A parallel situation is that of article 36 of the 1963 Vienna Convention on Consular Relations, which provides certain rights and obligations with a view to facilitating the exercise of consular functions relating to nationals of the sending State. Specifically, article 36 (1) (b) provides that:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.
>
> [...]
>
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

23. In the *LaGrand* decision, the International Court of Justice considered whether the reference to "rights" in the foregoing provision "applies only to the rights of the sending State and not also to those of the detained individual",[42] and concluded that "Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to 'rights' in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual".[43] The Special Rapporteur

[41] Ibid., paras. 180 and 181.

[42] *LaGrand Case (Germany v. United States of America), Judgment, ICJ Reports 2001*, p. 466, para. 89.

[43] Ibid.

notes that the Court understood article 36 in reference to two different axes: on the one hand, rights and obligations of States in relation to one another; and on the other, the rights and obligations of States in relation to the individual detainee. Such an approach is the one followed by the Special Rapporteur concerning the protection of persons in the event of disasters.

24. This approach was taken by the International Court of Justice in the *Avena and other Mexican Nationals* judgment.[44] When addressing the adequate reparations for the violation of article 36, the Court drew a difference between the obligations among Contracting Parties and the obligations in relation to an individual detainee.[45] Following this differentiation, the Court concluded, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts (...) with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice".[46]

25. Approaching a subject in consideration of the two axes referred to above does not imply any prior assessment of the status of the rights and obligations clustered around each axis. In the *Avena and other Mexican Nationals* decision, the International Court of Justice pondered whether the right of consular notification and communication was to be considered a fundamental human right. The Court held that it was unnecessary for it to decide on the status of that right: "Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that Mexico draws from its contention in that regard".[47]

26. The approach adopted in the present report is also present in the practice of the Dispute Settlement Body of the World Trade Organization (WTO). A case in point is the panel report in the case of *United States — Sections 301-310*,[48] where the panel analysed the implications of a certain domestic legal act for the application of article 23.1 of the Dispute Settlement Understanding. The panel considered the issue by seeking to identify the objects and purposes of the Dispute Settlement Understanding, and WTO more generally, that are relevant to a construction of article 23. For the panel, the most relevant were "those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system".[49] The panel noted that these goals are only achievable through the actions of private actors, which are not part of the multilateral trading regime, as "the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals".[50] However, for the panel,

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[44] *Case concerning Avena and other Mexican Nationals (Mexico v. United States), Judgment, ICJ Reports 2004*, p. 12.

[45] Ibid., paras. 121 and 122.

[46] Ibid., para. 121.

[47] Ibid., para. 124.

[48] *United States — Sections 301-310 of the Trade Act of 1974*, panel report, document WT/DS152/R (22 December 1999).

[49] Ibid., para. 7.71.

[50] Ibid., para. 7.72 (emphasis in the original).

> [I]t would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[51]

27. Such reasoning, and the aforementioned examples, reflect the approach adopted by the Special Rapporteur with regard to the protection of persons in the event of disasters. Firstly, rights and obligations of States in relation to one another may be discussed, in order to define at a later stage the rights and obligations of States in relation to persons in need of protection.

B. *Ratione personae*: States and non-State actors

28. Post-disaster relief commonly involves the participation of numerous actors, including several governmental agencies, the military, international and domestic non-governmental organizations, IFRC, national Red Cross and Red Crescent societies and the private sector. Through its Guidelines (see para. 4 above), IFRC has already made a substantial contribution to the domestic legal regime applicable to several of these actors, as it tries to improve the domestic legal, policy, and institutional frameworks concerning international disaster relief and initial recovery assistance.[52] In that context, defining a new, comprehensive legal framework for all actors involved in a post-disaster response would seem unnecessary, for it could overlap with work already done in the Guidelines. Moreover, and as significantly, such an effort would exceed what may be plausibly asked from the present undertaking. It seems, thus, of importance to prioritize the addressees of the Commission's work on the topic. The Special Rapporteur is of the opinion, prima facie, that the Commission could usefully start by focusing its efforts on rights and duties of States for guaranteeing the protection of persons in the event of disasters. This would be without prejudice to specific provisions that the Commission would discuss at a later stage, applicable to non-State actors.

C. *Ratione temporis*: Pre-disaster, disaster proper and post-disaster action

29. Intimately related to the prior points is the limitation of the topic *ratione temporis*. During the discussions in the Sixth Committee, a number of delegates suggested that work on the topic could be limited to the disaster proper and post-disaster phases.[53] Disaster risk reduction features an agenda that, according to the Hyogo Framework for Action, includes providing frameworks to (a) ensure that disaster risk reduction is a national and a local priority with a strong institutional basis for implementation; (b) identify, assess and monitor disaster risks and enhance early warning; (c) use knowledge, innovation and education to build a culture of

[51] Ibid., para. 7.73.

[52] See Guidelines, note 17 above, para. 3.

[53] See note 22 above.

safety and resilience at all levels; (d) reduce the underlying risk factors; and, (e) strengthen disaster preparedness for effective response at all levels.[54] The scope of these tasks could be overly ambitious to be appropriately covered in the present stage of work on the topic and may undermine more limited (yet relevant) contributions by the Commission to the protection of persons in the event of disasters. However, preparedness or action prior to the disaster should actively enhance the protection of persons in the ulterior phases. The Special Rapporteur is of the opinion that the way to reconcile such complementary needs is to follow the cited members' suggestion for the present phase of the work, and limit the scope of this topic, *ratione temporis*, to the disaster proper and post-disaster phases. This is without prejudice to the Commission addressing, at a later stage, preparedness at the pre-disaster phase.

30. Having considered the foregoing, it is possible to propose the following wording for a draft article on the scope of the draft articles:

Draft article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters, in order for States to ensure the realization of the rights of persons in such an event, by providing an adequate and effective response to their needs in all phases of a disaster.

D. Defining disaster

31. The Special Rapporteur notes that "disaster" is not a term of art and, as such, lacks one single accepted definition; consequently, as noted in the preliminary report (A/CN.4/598), some international instruments have forgone a definition altogether.[55] Yet, a definition seems of essential importance in the present context. Such a definition will help identify the situations in which protection may or shall be invoked, as well as the circumstances under which protection will no longer be necessary. Describing the contours of "disaster" will also help identify the persons in need of protection and thus ascertain who is entitled to protection. A definition should also fix reasonable limits on the scope of the topic, excluding events such as armed conflict.

32. The term "disaster" has been defined through two different methodologies in international law. The first is a specific approach, which does not dwell in an abstract definition of the term but understands it as a specific kind of event that warrants emergency treatment in and of itself. Following this approach, the question of whether an event falls under the definition of "disaster" becomes moot. That is the case of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[56] which avoids a definition of "disaster" but establishes the kind of cooperation to be undertaken by the Contracting Parties in case of a

[54] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1, chap. I, resolution 2), para. 14.

[55] See, for example, the Inter-American Convention to Facilitate Disaster Assistance of the Organization of American States. Opened for signature on 7 June 1991. Entered into force on 16 October 1996.

[56] United Nations, *Treaty Series*, vol. 1457, No. 24643.

nuclear accident or radiological emergency, events that are deemed to be disasters in and of themselves.

33. The second alternative is a broader definition of disaster, not restricted to a single kind of event. Considering that the topic is framed so as not to address the protection of persons in a specific hypothesis of disaster, but rather to codify and develop rules or guidelines that may be usefully applicable to all kinds of disasters, it seems appropriate to opt for this second methodology, that is, to propose a general definition establishing the necessary elements that characterize an event as a "disaster". To this effect, a good point of departure is the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[57] pointed out by the Finnish delegation in the Sixth Committee,[58] whose article 1.6 provides that

> "Disaster" means a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.

The same definition was used by IFRC in its Guidelines, though excluding armed conflicts.[59] This definition, including the latter caveat, provides a good basis at the start of work on the present topic.

34. Building on this basis, several aspects of the foregoing definition deserve the Commission's attention. The first refers to the requirement of harm (or lack thereof) in the definition of disaster: would the mere threat to human life be enough to consider an event a disaster? The Framework Convention on Civil Defence Assistance, for example, requires only threatened losses, defining in article 1 (c) disaster as "an exceptional situation in which life, property or the environment may be at risk".[60] A possible alternative would be to consider language that requires the existence of actual losses in the definition of disaster. An example of the latter may be the "Internationally agreed glossary of basic terms related to Disaster Management", developed by the Department of Humanitarian Affairs of the United Nations in 1992,[61] which defines disaster as:

> A serious disruption of the functioning of society, causing widespread human, material or environmental losses which exceed the ability of [the] affected society to cope using only its own resources. Disasters are often classified according to their cause (natural or man-made).

35. In addition to foreseeing actual losses, this definition and others require that the disaster overwhelm the affected region's response capacity. Another example of such a requirement may be found in the Agreement Establishing the Caribbean Disaster Emergency Response Agency:[62]

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[57] Available at www.reliefweb.int/telecoms/tampere/index.html.

[58] A/C.6/63/SR.22, para. 54.

[59] See section 2.1 of the Guidelines, note 17 above.

[60] Framework Convention on Civil Defence Assistance, United Nations, *Treaty Series*, vol. 2172, No. 38131.

[61] Document DHA/93/36 (1992), available at www.reliefweb.int/rw/lib.nsf/db900sid/CGEL-5EQNZV.

[62] Available at www.cdera.org/about_cdera_agreement.php.

> "Disaster" means a sudden event attributable directly and solely either to the operation of the forces of nature or to human intervention or to both of them and characterized by widespread destruction of lives or property accompanied by extensive dislocation of public services, but excluding events occasioned by war, military confrontation or mismanagement.

36. Moreover, the Tampere definition includes a reference to the causal element of disasters, in order to underscore that the definition covers both man-made and natural events. Reference to causation in the definition of "disaster" may fail to consider the problem of complex causation — that is, the problem that one condition can hardly be described as being the only and sufficient cause of a given consequence.[63] This obstacle seems of crucial importance today more than ever, when natural phenomena merge with human agency in the complex birth and expansion of disastrous events.[64] In this context, explicit reference to causation may be unnecessary in a definition of disaster. The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,[65] for example, does not employ a causal element, defining disaster as "a calamitous event resulting in loss of life, great human suffering and distress, and large-scale material damage".

37. This point leads to a more general conclusion. Several delegations in the Sixth Committee suggested that the definition of disaster may be usefully restricted to the impact of the event, and not necessarily to its origins.[66] This suggestion points in the correct direction. It seems of limited use to insist on a strict separation between natural and man-made disasters when, on the one hand, it is singularly difficult to establish a clear causal relation and, on the other, such a test would not imply a substantive contribution to the definition of the term. That is, though, without prejudice to the use of said distinction in contexts other than the definition of disaster, as the Commission may find useful or necessary in its future work.

38. Furthermore, the present topic relates specifically to protection of persons in the event of disasters. The Tampere and most other definitions include threat of harm not only to persons, but also to property and the environment. Should the definition of disaster in the present report be limited to loss of human life or health? That would not appear to be the case. While, as it currently stands, the topic is limited to the protection of persons, losses amounting to a disaster that would trigger such protection are not thus limited. An environmental disaster calls for the protection of persons for, in the words of the International Court of Justice, "the

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[63] In Hume's words, causation "belongs entirely to the soul which considers the union of two or more objects in all past instances" (D. Hume, *Treatise of Human Nature* (1978 [1739]),166). On the problematic relation between causes and conditions, see generally J. S. Mill, *A System of Logic Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation*, Book III, Ch. V, § 3 [1843], in *The Collected Works of John Stuart Mill*, ed. J. M. Robson (1974), VII, at p. 327. On the same problem in legal reasoning, see H. L. A. Hart and T. Honoré, *Causation in the Law* (1985), at II.

[64] See, generally, U. Beck, *Risk Society: Towards a New Modernity* (1992), p. 21; A. Giddens, *Affluence, Poverty and the Idea of a Post-scarcity Society, UNRISD Discussion Paper No. 63* (1995), at p. 4.

[65] Annex VI to the report entitled "Principles and response in international humanitarian assistance and protection", document 95/C.II/2/1, 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995.

[66] See note 20 above.

environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[67] Similarly, widespread material destruction could also warrant protection of persons. Drawing strict conceptual lines in the context of disastrous situations may be undesirable, as material and environmental losses are inextricably linked to human life and health, warranting, as a unit, the protection of persons in the aftermath of a disaster. While this seems clear in the context of a definition, in view of the topic's limitation it remains subject to guidance by the Commission whether further work should assess in detail the protection of property or the environment in the event of a disaster.

39. Among the instruments that do not limit their definitions of disaster to those that directly affect human life or health is the Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (also known as the International Charter on Space and Major Disasters).[68] Article I of the Charter states:

> The term "natural or technological disaster" means a situation of great distress involving loss of human life or large-scale damage to property, caused by a natural phenomenon, such as a cyclone, tornado, earthquake, volcanic eruption, flood or forest fire, or by a technological accident, such as pollution by hydrocarbons, toxic or radioactive substances.

40. It should be noted that the International Charter on Space and Major Disasters also includes a detailed contemplation of the causes of disasters. Similarly, the Framework Convention on Civil Defence Assistance, an instrument intended to promote effective disaster prevention and crisis management, deals with environmental and material threats, but does not include a causal element:

> "Disaster" is an exceptional situation in which life, property or the environment may be at risk. [69]

41. The Red Cross/Red Crescent code of conduct, issued in 1995, appears to take a much more restrictive approach, requiring both loss of life and material damage. The code defines disaster as

> a calamitous event resulting in loss of life, great human suffering and distress, and large scale material damage.[70]

42. An alternate approach embraces disasters that cause either loss of life, property damage or environmental degradation, but contains an additional restrictive requirement that the event be of such scale that the local community is incapable of adequately responding. Consider a definition of natural disaster offered by the Operational Guidelines on Human Rights and Natural Disasters adopted by the Inter-Agency Standing Committee:

> "Natural disaster" refers to the consequences of events triggered by such natural hazards as earthquakes, volcanic eruptions, landslides, tsunamis, floods and drought that overwhelm local response capacity. Such disasters seriously disrupt the functioning of a community or a society causing widespread

[67] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 241, para. 29.

[68] Available at www.disasterscharter.org/.

[69] See Framework Convention on Civil Defence Assistance, note 60 above.

[70] See note 65 above.

human, material, economic or environmental losses, which exceed the ability of the affected community or society to cope by using its own resources.[71]

43. ISDR has adopted similar language in its own definition, defining disaster as

> a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources.[72]

44. After reviewing such definitions, among others, the Special Rapporteur is of the opinion that the Tampere Convention appears to provide the best guidance for this topic. The convention's definition considers natural and man-made phenomena and acknowledges the reality that disasters often result from a complex web of factors, where no single sufficient cause may be identified. In addition, the convention's definition includes events that threaten not only human life, but also property and the environment. As noted above, each of such threats is severe enough to give rise to a need for protection.

45. Considering the foregoing, it seems possible to conclude this section with the following draft language of a definition of disaster:

Draft article 2
Definition of disaster

> "Disaster" means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.

46. This definition adopts the basic characterization of disaster as a "serious disruption", a term employed by the Tampere Convention of 1998 and other recent definitions.[73] This usage reflects the general understanding that the threshold in determining the existence of a disaster should be the degree of dysfunction of the society in which it occurs. This definition does not, however, demand that the event "overwhelm a society's response capacity".[74] Such a requirement would shift the present topic's focus from the persons in need of protection.

47. Moreover, the Special Rapporteur underscores that some actual loss is required, as opposed to the mere threat of harm. This sits most comfortably with the common understanding of disaster as a calamitous event, and it refers to those situations that would call for the protection of persons. The type of harm, however, is not limited to loss of life or health, reflecting the fact that severe environmental degradation or property damage will warrant certain protections.

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[71] Brookings-Bern Project on Internal Displacement, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster* (2008).

[72] ISDR, UNISDR *Terminology on Disaster Risk Reduction*, available at www.unisdr.org/eng/library/ UNISDR-terminology-2009-eng.pdf.

[73] See IFRC, note 17 above, and Department of Humanitarian Affairs definition, note 61 above. See also the International Charter on Space and Major Disasters ("situation of great distress") note 68 above, and the Agreement Establishing the Caribbean Disaster Emergency Response Agency ("accompanied by extensive dislocation of public services"), note 62 above.

[74] See Brookings-Bern Project, note 71 above. See also Department of Humanitarian Affairs, note 61 above.

48. Similarly, the definition does not distinguish between natural and man-made events, recognizing that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities. Armed conflicts are expressly excluded, with the understanding that a well-developed body of law exists to cover such situations.

49. Finally, the definition excludes an inquiry into causation. Disasters generally arise from a complex set of factors, making virtually impossible any effort to identify a single sufficient cause. Furthermore, in light of this topic's focus on protection of persons, the inquiry into a calamity's root cause is immaterial. The disruption itself, not the originating causal phenomena, gives rise to the need for protection. This definition, focusing on the disruption and its particular harms, builds the most appropriate framework to explore the rights and obligations relating to protection of persons.

III. Solidarity and cooperation

50. The underlying principles in the protection of persons in the event of disasters are those of solidarity and cooperation, both among nations and among individual human beings. It is in the solidarity inspired by human suffering that the Commission's mandate finds *telos*, as an expression of our common heritage in a global context.

51. In such a context, effective international cooperation is indispensable for the protection of persons in the event of disasters. As has been observed by the Secretary-General,

> [t]he belief in the dignity and value of human beings as expressed in the preamble of the Charter of the United Nations is and must be the prime motive for the international community to give humanitarian assistance. The concept of international solidarity so often evoked following major emergencies and understood as a feeling of responsibility towards people in distress equally has its roots in the ethical principles of the Charter. Solidarity in this sense is not charity.[75]

More recently, the independent expert on human rights and international solidarity held that:

> [i]nternational solidarity and international cooperation are based on the foundation of shared responsibility. In the broadest sense, solidarity is a communion of responsibilities and interest between individuals, groups and States, connected by the ideal of fraternity and the notion of cooperation. The relationship between international solidarity and international cooperation is an integral one, with international cooperation as a core vehicle by which collective goals and the union of interests are achieved.[76]

[75] A/45/587, para. 5.

[76] A/HRC/9/10, para. 6. See also resolution 46/182 of 19 December 1991, operative para. 5.

An expression of the principle of solidarity can be found in the 2005 Hyogo Declaration:

> We are determined to reduce disaster losses of lives and other social, economic and environmental assets worldwide, mindful of the importance of international cooperation, solidarity and partnership, as well as good governance at all levels.[77]

52. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself.[78] Article 1(3) of the Charter clearly spells out as one of the purposes of the Organization:

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Articles 55 and 56 of the Charter elaborate on Article 1(3) with respect to international cooperation. Article 55 of the Charter reads:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 of the Charter reads:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

53. The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the

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[77] A/CONF.206/6 and Corr.1, chap. I, resolution 1, fifth preambular paragraph.

[78] See A/CN.4/590, para. 17 and note 57.

general welfare of nations and international cooperation free from discrimination based on such differences.[79]

As interpreted by one author, this obligation "consecrat[es] the solidarity of nations".[80]

54. Solidarity as an international legal principle, and distinct from charity, gives rise to a system of cooperation in furtherance of the notion that justice and the common good are best served by policies that benefit all nations.[81] Seen in this light, it can also be traceable in the context of international environmental law, in relation to the role of the developing world. Thus, the Stockholm Declaration of 1972 proclaimed that nations must undertake a coordinated effort to preserve and safeguard natural resources, insofar as environmental protection "affects the well-being of peoples and economic development throughout the world".[82] Recognizing that "environmental deficiencies generated by the conditions of under-development and natural disaster pose grave problems", the Declaration calls for accelerated development through financial and technological assistance.[83] The Declaration further provides that developing countries shall provide, and developing countries shall assist in promoting, scientific information and expertise relevant to mitigating environmental degradation.[84] The duties placed on developed and developing States alike are premised on the recognition that global environmental problems "will require extensive cooperation among nations"[85] with the specific understanding that "industrialized countries should make efforts to reduce the gap [between] themselves and the developing countries".[86] Moreover, the Rio Declaration on Environment and Development, reaffirming Stockholm, prioritizes the concerns of developing countries, stating that the "special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority".[87]

55. Subsequent instruments implemented this obligation to cooperate, establishing mechanisms to share information, finances and scientific resources. The Vienna Convention for the Protection of the Ozone Layer,[88] for example, mandates cooperative research and information-sharing among all States parties to the Convention. In 1990, the amending Montreal Protocol[89] fulfilled the Vienna

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[79] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[80] B. Babović, "The duty of States to cooperate with one another in accordance with the Charter", in Milan Šahović, *Principles of International Law Concerning Friendly Relations and Cooperation* (Dobbs Ferry, New York: Oceana Publications, 1972), at p. 289.

[81] See generally R. St. J. Macdonald, "Solidarity in the practice and discourse of public international law" in C. Dominicé, R. Patry and C. Reymond (eds.), *Etudes de Droit International en l'honneur de Pierre Lalive* (1993), at p. 275.

[82] Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1992* (United Nations publication, Sales No. E.73.II.A.14), and corrigendum, chap. I.

[83] Ibid., principle 9.

[84] Ibid., principle 20.

[85] Ibid., para. 7.

[86] Ibid., para. 4.

[87] Report of the *United Nations Conference on Environment and Development Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda).

[88] United Nations, *Treaty Series*, vol. 1513, No. 26164.

[89] Montreal Protocol on Substances that Deplete the Ozone Layer, United Nations, *Treaty Series*, vol. 1522, No. A-26369.

Convention's promise to take into account the "circumstances and particular requirements of developing countries". Developing countries are given leniency with respect to certain proscribed or regulated chemicals,[90] and the Protocol mandates that developed nations shall provide financial assistance and technology to less-developed nations.[91] The Protocol establishes a multilateral fund to motivate participation by developing countries.[92] In turn, developing nations are bound to pollution control measures, and the parties to the Convention are empowered to invoke non-compliance procedures where appropriate.[93]

56. As noted above, solidarity is an important element of cooperation towards solving economic problems, as put forward in Article 1(3) of the Charter of the United Nations and in the 1970 Friendly Relations Declaration.[94] The Declaration recognizes a duty of States to cooperate with one another, and provides that "States should cooperate in the promotion of economic growth throughout the world, especially that of the developing countries".[95] This concept was brought to the fore and expanded by the Declaration on the Establishment of a New International Economic Order.[96] The Declaration is based upon a duty of States to cooperate "in the solving of world economic problems [...] bearing in mind the necessity to ensure accelerated development of all the developing countries".[97] And further holds that "cooperation for development is the shared goal and common duty of all countries".[98]

57. Solidarity as an international legal principle found reflection beyond the 1974 Declaration. The Declaration of International Economic Cooperation, adopted by the General Assembly in 1990, notes the interdependence of the international community[99] and recognizes that reviving growth in developing countries requires "a concerted and committed effort by all countries".[100] Most recently, the United Nations Millennium Declaration places solidarity among the fundamental values essential to international relations.[101] The declaration further elaborates on its invocation of solidarity:

> Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.[102]

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[90] Ibid., art. 5, paras. 1-3.

[91] Ibid., arts. 10 and 10A; see also art. 5, para. 5 (noting that developing nations' compliance with the Protocol's control measures will be contingent on developed countries' willingness to provide financial and technological assistance).

[92] Ibid., art 10.

[93] Ibid., art 5.

[94] General Assembly resolution 2625 (XXV), annex.

[95] Ibid.

[96] General Assembly resolution 3201 (S-VI) of 1 May 1974.

[97] Ibid., para. 4.

[98] Ibid., para. 3.

[99] General Assembly resolution S-18/3 of 1 May 1990, annex, para. 12.

[100] Ibid., para. 21.

[101] See General Assembly resolution 55/2 of 8 September 2000, para. 6.

[102] Ibid.

58. Solidarity is also reflected in regional instruments. The African Charter on Human and Peoples' Rights[103] establishes that individuals and groups should dispose of their wealth "with a view to strengthening African unity and solidarity"[104] and guarantees the right to social and economic development.[105] It also establishes a right to a "satisfactory environment"[106] and the duty of the individual to promote social and national solidarity.[107]

59. The international cooperation imperative is firmly rooted in international instruments of a humanitarian character. As noted above, the duty to cooperate in the context of human rights has been explicitly embodied in Article 1(3) of the Charter of the United Nations. Likewise, it has been reiterated in numerous General Assembly declarations and resolutions. Thus, for example, the Friendly Relations Declaration proclaims:

> States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance.[108]

And in its resolution 56/152, entitled "Respect for the purposes and principles contained in the Charter of the United Nations to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms and in solving international problems of a humanitarian character", the General Assembly affirmed

> the solemn commitment of all States to enhance international cooperation in the field of human rights and in the solution to international problems of a humanitarian character in full compliance with the Charter of the United Nations.

60. As has been pointed out in the preliminary report on this topic, international human rights law takes on special significance in this context.[109] The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.[110] This has been reiterated by the Committee on Economic, Social and Cultural Rights in its General Comments relating to the implementation of specific rights guaranteed by the Covenant.[111] In a recent resolution, the Economic and Social Council encouraged

> Member States and, where applicable, regional organizations to strengthen operational and legal frameworks for international disaster relief, [to take] into account, as appropriate, the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,

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[103] United Nations, *Treaty Series*, vol. 1520, No. 26363.
[104] Ibid., art. 21, para. 4.
[105] Ibid., art. 22.
[106] Ibid., art. 24.
[107] Ibid., art. 29, para. 4.
[108] See note 79 above.
[109] See A/CN.4/598, paras. 25 and 26.
[110] General Assembly resolution 2200 A (XXI), annex, arts. 11, 15, 22 and 23.
[111] See, in particular, General Comment No. 2 (E/1990/23), No. 3 (E/1991/23), No. 7 (E/1998/22), No. 14 (E/C.12/2000/4) and No. 15 (E/C.12/2002/11).

adopted at the thirtieth International Conference of the Red Cross and Red Crescent held in Geneva in November 2007.[112]

And, in the same resolution, the Council

Recognizes the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourages the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-governmental organizations and other participants of the Inter-Agency Standing Committee.[113]

61. International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities which is, inter alia, applicable "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".[114] In a separate article of that Convention international cooperation is dealt with in the following terms:

States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.[115]

62. There is a vast number of instruments of specific relevance to the protection of persons in the event of disasters which demonstrate the importance of the imperative of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.[116] Moreover, the cooperation imperative, usually laid down in the preamble of a particular instrument, in the vast majority of cases is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish "to facilitate international cooperation to mitigate the impact of disaster".[117] Another example, very much in line with the scope of the present topic, can be found in an agreement between France and Malaysia:

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[112] Resolution 2008/36 of 25 July 2008, para. 5

[113] Ibid., para. 7

[114] General Assembly resolution 61/106 of 13 December 2006, art. 11.

[115] Ibid., art. 32.

[116] See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see H. Fischer, "International disaster response law treaties: trends, patterns, and lacunae" in IFRC, *International disaster response laws, principles and practice: reflections, prospects and challenges* (2003), at pp. 24-44 ("Despite the fact that in all cases the specific purpose is different, the underlying rationale is the need to increase capacities to deal with the effects of disaster", p. 33)

[117] See note 57 above.

> Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment ...[118]

63. Cooperation should, however, not be interpreted as diminishing the prerogatives of a sovereign State within the limits of international law. On the contrary, the principle underlines respect for the sovereignty of States and its corollary, non-intervention and the primary role of State authorities in the initiation, organization, coordination and implementation of the measures relevant to the protection of persons in the event of disasters. Sovereignty may be conceived as "a concept to describe a pre-existing reality, a scheme of interpretation, used to organize and structure our understanding of political life".[119] Non-intervention is a well-established principle of international law, dating from the early stages of that body of law,[120] whose substantive contents need not be restated here. Suffice it to point out that the protection of persons in the event of disasters will often involve the adoption of political, regulatory, administrative and juridical measures by the affected State, including the deployment of its armed forces within its own territory, which are expressions of the "right of every sovereign State to conduct its affairs without outside interference", as the International Court of Justice defined said principle in its 1986 Judgment in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.[121]

64. It is the primary duty of the authorities of the affected State to take care of the victims of natural disasters and similar emergencies occurring in its territory.[122] In the words of the General Assembly, "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity"[123]

65. Cooperation complements the primary duty of States. However, this primary duty concerns not only Governments and governmental authorities, but also competent international organizations and elements of civil society, such as national Red Cross and Red Crescent societies. The position has been characterized with clarity by the Secretary-General as early as 1971 in the comprehensive report entitled "Assistance in Cases of Natural Disaster":

> While a Government should be able to count on the help of the international community, provided through Governments, the League of Red Cross Societies

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[118] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4: "Convaincus de la nécessité de developer une cooperation entre les organisms compétents de deux Parties dans la domaine de la prévention des risques majeurs et de la protection des populations, des biens et de l'environnement" (English translation by the Special Rapporteur).

[119] W. G. Werner, "State Sovereignty and International Legal Discourse", in: Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory*, Martinus Nijhoff Publishers (2004), at 155.

[120] For an early exposition of its origins, see M. Bernard, *On the Principle of Non-Intervention. A Lecture Delivered in the Hall of All Souls' College* (1860).

[121] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986*, para. 202.

[122] Resolution 46/182 of 19 December 1991, annex, para. 4. See also Hyogo Declaration 2005, note 77 above, para. 4.

[123] Resolution 45/100 of 14 December 1990, sixth preambular paragraph.

> and other voluntary agencies or the United Nations organizations, in its preparations against or its efforts to meet such emergencies, the primary responsibility for protecting the life, health and property of people within its frontiers and for maintaining the essential public services rests with that Government. International assistance can only supplement, and will depend very largely for its effectiveness on, the efforts of the country itself through its Government or through such organizations as its national Red Cross society.[124]

66. The 2008 Secretariat memorandum points out the link between the principle of cooperation as a sine qua non for this topic and the multiple actors involved, listing not only State actors but also non-State actors, that is, relief organizations.[125] The involvement of and cooperation with non-State actors has thus gradually found its way into the international legal discourse which recognizes that the increasing interdependence within international society necessitates international cooperation including actors other than States. In the words of the Independent expert on human rights and international solidarity:

> From a global perspective, interdependence, by its very nature, exists not only between States, but also between other international actors, and these relationships require international cooperation.[126]

67. The role of those actors has been recognized as essential for combating the effects of disasters. The duty of States to cooperate with the United Nations is expressed in Article 56 of the Charter and the Organization has, in turn, emphasized the need to work in close cooperation with IFRC[127] and with non-governmental organizations and civil society as a whole.[128]

68. In addition, a number of treaties between States and international organizations[129] have been concluded that acknowledge the importance of international cooperation between State actors and non-State actors at the international level.[130] Other international instruments do likewise. The preamble to the 1992 Rio Declaration cites the goal of "establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people".[131] The concept of global partnership is then

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[124] E/4994, para. 100. This point was reaffirmed by the General Assembly in resolution 43/131 of 8 December 1988.

[125] A/CN.4/590, para. 18.

[126] A/HRC/4/8, para. 11.

[127] See, inter alia, resolutions 2435 (XXIII) of 19 December 1968, 2816 (XXVI) of 14 December 1971, 36/225 of 17 December 1981, 46/182 of 19 December 1990, 57/150 of 16 December 2002 and 63/139 of 11 December 2008.

[128] Resolutions 63/139 of 11 December 2008 and 63/141 of 11 December 2008.

[129] The Special Rapporteur follows the definition provisionally adopted by the Commission under the topic of "Responsibility of international organizations". Draft article 2 defines an international organization for the purposes of the draft articles as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities", *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 164.

[130] See the list of instruments between States and international organizations in A/CN.4/590/Add.2, annex II, sect. III.

[131] See note 87 above.

repeated in principles 7, 21 and 27. Cooperation is expressed in a number of ways. With regard to the present topic, principle 18 provides:

> States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

The ASEAN Agreement on Disaster Management and Emergency Response of 2005 states that:

> [t]he Parties, in addressing disaster risks, shall involve, as appropriate, all stakeholders including local communities, non-governmental organizations and private enterprises, utilizing, among others, community-based disaster preparedness and early response approaches.[132]

The 1986 Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency provides in its first article:

> The States Parties shall cooperate between themselves and with the International Atomic Energy Agency.

The Hyogo Declaration expresses the value of non-State actor involvement in the context of disaster reduction in terms of "cooperation, including partnerships".[133] Likewise, the Institute of International Law, in its resolution on humanitarian assistance, has recognized the "essential role played by the United Nations, intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations".[134]

69. The concept of civil society does not necessarily carry a transnational connotation. Rather, it emphasizes local civil society. The working definition proposed by the London School of Economics Centre for Civil Society is illustrative:

> Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.[135]

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[132] ASEAN Document Series 2005, p. 157, article 3(6).

[133] Hyogo Declaration 2005, note 77 above, para. 4. See also para. 2 in which "the importance of involving all stakeholders" is underlined.

[134] Resolution adopted on 2 September 2003 at the session held in Bruges, Belgium.

[135] "What is Civil Society?", Centre for Civil Society, London School of Economics, 2004, available at http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm.

70. In the light of the foregoing, the Special Rapporteur proposes the following draft article on the duty of cooperation:

Draft article 3
Duty to cooperate

For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:

(a) competent international organizations, in particular the United Nations;

(b) the International Federation of Red Cross and Red Crescent Societies; and

(c) civil society.

IV. Future work

71. The present report has focused on the scope of the protection of persons in the event of disasters and proposed a definition of disaster. It has stressed the conceptual approach to guide further developments, and has put forward a draft article on the basic principle that inspires work on the topic. As the next step, work shall be directed towards complementing the first axis, namely, that of the rights and obligations of States in relation to one another, and identifying the principles that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection. Further work will concentrate on the operational aspects of disaster relief and assistance.